

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

In the Matter of Contract Controversy of:)

CASE No. 2010 - 102

Family Preservation Community Services)

v.

Department of Social Services

Materials Management Office

FPB No. 06-S7191 - 5400000526

POSTING DATE: June 18, 2010

MAILING DATE: June 18, 2010

This matter is before the Chief Procurement Officer (CPO) due to a request for resolution of a contract controversy pursuant to Section 11-35-4230 of the S.C. Consolidated Procurement Code (Code). With this fixed price bid (FPB), in 2006, the Materials Management Office (MMO) awarded multi-agency contracts for various levels of residential services for children. The state agencies that may purchase services under the contracts were the Department of Disabilities and Special Needs, the Department of Juvenile Justice, the Department of Mental Health, the Department of Social Services (DSS), and the Office of the Governor, Governor's Office, Continuum of Care for Emotionally Disturbed Children Division. Of the service level awards, one was for therapeutic foster care placement services. Family Preservation Community Services (FPCS) was the recipient of an award for therapeutic foster care placements.

In its letter dated January 29, 2010, FPCS requested the CPO's assistance in resolving a contract controversy with DSS writing:

We are in receipt of the above solicitation, which amounts to a modification of the contract my client has with the department, and lodge the following formal protest pursuant to law, sometimes known as a "contract controversy."

Protest: My client protests the action of the department, reflected above. The above-referenced amendment reduces the daily payment rate for services provided by my client to the department by nine (9%) percent of the original contract.

Grounds: The grounds for this protest are that the rate reduction imposed is a unilateral modification of the contract, and a breach of the contract. Furthermore, the rate reduction is arbitrary and capricious, and in violation of applicable state and federal law.

Relief sought: My client seeks enforcement of the present terms of the contract, without any rate reduction imposed by this solicitation or amendment for the contract period. Moreover, we seek a stay of the reduction in rate until this matter may be finally resolved pursuant to the terms of the South Carolina Procurement Code, and other applicable law.

The “solicitation” referred to above was actually a document entitled Amendment 5, issued by MMO, as a change order at the request of DSS. (Ex’s. 8 and 9)

Appearing before the CPO in this matter were FPCS, represented by John D. Elliott, Esq.; DSS, represented by Kathy Gettys, Esq.; and MMO, represented by John Stevens, State Procurement Officer.

NATURE OF PROTEST

The letter requesting resolution of the contract controversy is attached and incorporated herein by reference.

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On April 24, 2006, MMO issued fixed price bid No. 06-S7191.¹ [Ex. 1]
2. Subsequently, MMO issued Amendment No. 1. [Ex. 2]
3. On May 16, 2006, MMO issued Amendment No. 2. [Ex. 3]

¹ In 2007, MMO converted to a new automated procurement system. All active contracts were transferred into the new system. This solicitation was transferred into the new system and reassigned the number 5400000526.

4. On May 30, 2006, MMO opened the bids received, including FPCS's bid. (Ex. 4).
5. On June 13, 2006, MMO posted its intent to award and awarded FPCS contracts for:
 - Therapeutic Foster Care, Levels I, II, and III
 - Medical Therapeutic Foster Care, Levels I, II, and II
 - De-Escalation Therapeutic Foster Care, Levels I, II, and III (Ex. 5)
6. On September 25, 2008, MMO issued a document entitled Amendment No. 3, which modified the contract. Specific to this controversy, the Amendment read, "Residential Treatment Facilities and Therapeutic Foster Care providers will continue to have their rates set by Health and Human Services and the other participating agencies." (Ex. 6)
7. On October 21, 2009, MMO issued a document entitled Amendment No. 4, a contract modification. (Ex. 7)
8. On January 19, 2010, MMO issued Amendment No. 5, the contract document in question here, stating, in relevant part:

MODIFICATIONS:

Due to a series of budget cuts over the past two years, amounting to a 29% reduction in state funds available to The South Carolina Department of Social Services (SCDSS), SCDSS has made the decision to impose, effective January 16, 2010, a reduction to that portion of provider rates paid directly by SCDSS.

For providers of group home services (includes Group Care Intensive, Group Care Intermediate, and Group Care Supervised Independent Living providers), the amount of the reduction is 9% of the current SCDSS daily payment rate.

For providers of Therapeutic Foster Care, (THERAPEUTIC FOSTER CARE) and Medical Therapeutic Foster Care (THERAPEUTIC FOSTER CARE) services, the amount of the reduction is 9% of the SCDSS direct payment portion for each level of care. Medicaid reimbursement rates, if any, are not affected by these reductions.

The listed reductions only affect the rates paid by SCDSS.

Any new providers receiving a state contract under the terms of this solicitation will receive from SCDSS the average rate for providers as set forth in Amendment 3, State Standards, less the reductions noted herein. (Emphasis theirs)

FPCS'S ARGUMENT

FPCS alleged breach of contract by DSS based on DSS's January 19, 2010, unilateral nine percent (9%) reduction in the daily rates paid FPCS by DSS. FPCS seeks enforcement of the "present" (pre-January 19) terms of the contract. In a supporting memorandum dated March 10, 2010, FPCS wrote, in part, that its issues were:

- 1) The Department's unilateral reduction in compensation for the services of Family Preservation Services is a breach of its contract with Family Preservation Services in that "Family Preservation Services has a contract for a fixed rate, set forth above, and that rate continues until the end of the contract, June 20th, 2010. The Department cannot, under plain principles of contract, unilaterally change the terms." Further, FPCS argues, "There is a provision under the RFP, and a standard one, that the contract may be terminated due to unavailability of funds, at page 64, "Termination Due to Unavailability of Funds." That provision clearly allows termination only for a succeeding fiscal period, not the middle of any such period, as the Department has done here."
- 2) The Department may not make decisions, including budget decisions with regard to its contractors, which are arbitrary and capricious in that "Here, the department simply announced it needed to save money in some amount, due to budget cuts, and ordered a 9% cut in the board rate for Family Preservation Services and its other providers." FPCS argues further, "Illustrating just how arbitrary the department's decision is, the department has not cut its board rate for traditional foster homes. Moreover, the department operates a series of therapeutic foster homes under its own auspices, Specialized Intensive Foster Care Services, with the same board rates reflected above. It has not cut those either."
- 3) The action of the department violates federal law in that "The federal Act requires the states to pay foster care payments in an amount sufficient to cover the reasonable costs "...and the costs of providing" food, clothing, shelter, daily supervision, school supplies, the child's personal incidentals, liability insurance, travel for visitation and to school. 42. U.S.C. Section 675(4)(A). For agencies such as Family Preservation Services, the Act requires the state to reimburse the reasonable costs of administration and operation of the agency or institution required to provide the foregoing foster care maintenance."

DSS'S ARGUMENT

In response, DSS contends that the contract allows the rates to be amended. Further, DSS' position is that the contract permits the participating agencies to collectively set rates in conjunction with the Department of Health and Human Services (DHHS) or to independently set its own rates in

conjunction with DHHS. According to DSS, the providers, including FPCS, were required to accept the rates that were determined.

BACKGROUND

The rate paid providers under the contract is a composite rate of two separate factors: 1) treatment; and 2) room, board, and support services. Medicaid reimbursements, which were historically primarily for treatment services, are set by DHHS and are not within the control of the using agencies. DHHS is not a party to the contract, and it does not utilize the services of the providers. Instead DHHS functions as a third party administrator that evaluates provider budgets and establishes the rates that providers are eligible to receive from Medicaid. Agency rates, which were historically primarily for room and board, are set by the using agencies.

Regarding price to be paid providers, the FPB reads, “The reimbursement level is determined by the South Carolina Department of Health and Human Services (DHHS) and participating state agencies. Adherence and acceptance is required by all qualified providers.” (Ex. 1, p. 22, Bidding Condition of Price) Regarding rates and payment, the FPB later reads, “Health and Human Services will review program budgets. Based on this review, daily rates will be established by Health and Human Services (regarding whether the rates will stay the same) and the participating state agencies.” (Ex. 1, p. 23, Rate and Payment) In response to a question, Amendment 2 states, “SCDHHS determines the treatment rate. The room and board rate is determined by SCDHHS with involvement of state agencies. At this time, it is the understanding of state agencies that current rates will remain in effect.” (Ex. 3, p. 10)

Regarding placement of eligible clients, the FPB reads, “All approved and qualified providers will be placed on a Qualified Providers List (QPL) from which local offices of the participating State

agencies may select a provider for a particular client. Being placed on the Qualified Provider List does not provide a guarantee as to a specific number of clients to be served or a certain funding level for any provider...” [Ex. 1, p. 11, Qualified Provider List] Further, the FPB states, “In order to assure availability of placement for its clients, State agencies may, at their option, request that a provider reserve a certain number of slots/beds for the exclusive use of one or more of the participating agencies. If a provider agrees to such a request, the participating agency will guarantee payment, at the established rate or any lower rate agreed upon by the provider and the agency.” [Ex. 1, p. 11, Guaranteed Beds] In its response to the solicitation, FPCS wrote, “We agree to accept the reimbursement level determined by the South Carolina Department of Health and Human Services (DHHS) and the state agencies.” [Ex. 4, p. 8]

The rates paid to providers for therapeutic foster care (THERAPEUTIC FOSTER CARE) from the start of the contract on July 1, 2006 through July 31, 2009 were as follows:

	<u>Treatment</u>	<u>Room & Board</u>	<u>Total</u>
THERAPEUTIC FOSTER CARE Level I	\$55.08	\$13.07	\$68.15
THERAPEUTIC FOSTER CARE Level II	\$88.52	\$13.07	\$101.59
THERAPEUTIC FOSTER CARE Level III	\$127.29	\$13.07	\$140.36

In August 2009 the rates were changed. The new rates paid to providers for THERAPEUTIC FOSTER CARE from August 1, 2009 through January 15, 2010 were as follows:

	<u>Treatment</u>	<u>Room & Board</u>	<u>Total</u>
THERAPEUTIC FOSTER CARE Level I	\$27.50	\$42.50	\$70.00
THERAPEUTIC FOSTER CARE Level II	\$44.25	\$57.75	\$102.00
THERAPEUTIC FOSTER CARE Level III	\$63.65	\$78.35	\$142.00

Based on Amendment No. 5, DSS changed its rates. The DSS rates paid to providers for THERAPEUTIC FOSTER CARE beginning January 16, 2010 were as follows:

	<u>Treatment</u>	<u>Room & Board</u>	<u>Total</u>
THERAPEUTIC FOSTER CARE Level I	\$27.50	\$38.67	\$66.17
THERAPEUTIC FOSTER CARE Level II	\$44.25	\$52.55	\$96.80
THERAPEUTIC FOSTER CARE Level III	\$63.65	\$71.30	\$134.95

The rates for the other participating agencies did not change on January 16, 2010. Instead all agencies other than DSS remained at the rates effective since August 1, 2009.

DETERMINATION

FPCS alleged, “The Department’s unilateral reduction in compensation for the services of Family Preservation Services is a breach of its contract with Family Preservation Services in that “Family Preservation Services has a contract for a fixed rate, set forth above, and that rate continues until the end of the contract, June 20th, 2010. The Department cannot, under plain principles of contract, unilaterally change the terms.” This allegation involves MMO’s Amendment # 5 dated January 19, 2010 when MMO acquiesced to DSS’s demands to lower daily rates it, and it alone, pays providers of THERAPEUTIC FOSTER CARE services for room, board, and support services.

The CPO finds the contract permits the government to modify rates without providers’ consent but only in accordance with the terms and conditions in the contract. Given their plain meaning and read as a whole, the provisions of the FPB require the agreement of all participating agencies and the approval of DHHS for rate changes. In other words, the contract requires that the participating state agencies work together in this contracting effort and collectively establish rates for child residential services along with DHHS. Obviously they could not collectively agree to change the rates to zero

dollars, but the degree of the rate changes and the reasonableness thereof are not the issues before the CPO in this action. Instead the issue is whether DSS' independent action of changing the rates was done in violation of the contract. The CPO concludes that DSS did breach the contract because DSS improperly acted unilaterally and changed the rates instead of collectively doing so along with DHHS and the other participating agencies as required by the terms of the contract.²

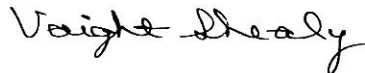
This conclusion is further supported by the party's course of dealing with the providers. Before January 16, 2010, for the entire life of the contracts awarded under this solicitation, rates for THERAPEUTIC FOSTER CARE services provided by FPCS, at least, have been consistent across the participating agencies with all agencies paying FPCS the same rate. Even when faced with a radical revision by Medicaid of the rates to be paid by DHHS for treatment, the child welfare agencies addressed the matter collectively and all the agencies, including DSS, increased their rates to be paid FPCS for room, board, and support services with DHHS' approval on August 1, 2009. This collective rate was effective for all child welfare agencies utilizing FPCS for THERAPEUTIC FOSTER CARE until January 19, 2010. However, in January 2010, for the first time in the history of this contract, DSS abandoned that coalition of state child welfare agencies and lowered the rates it paid to FPSC.³

Therefore, the CPO finds that DSS' change of the rates effective January 16, 2010 violated the FPB and was improper. Accordingly, for the period of January 16, 2010 to the present, DSS was

² Historically, agencies of this state contracted for numerous levels of care for emotionally disturbed children individually, not collectively. The practice of that day not only overburdened the procurement and bidding processes for the state and the providers, but it created a situation where two agencies placing children with similar treatment needs in the same facility on the same day might pay different rates for room and board for the children. After years of attempts, MMO convinced the then administrators of the child welfare agencies to end that disparate approach to child care and to consolidate the process of contracting for child welfare care into coordinated, multi-agency solicitations that standardized care as well as rates of pay for providers who care for all children in the care of the State of South Carolina. Regarding rates of pay, the FPB requires a deliberative, concerted effort among MMO and the child welfare agencies to set standard rates for child welfare care across agency boundaries.

³ The CPO recognizes that certain rate adjustments may be needed to customize care for each child based upon his or her needs, but the actions of January 2010 by DSS did not consider, nor were they driven by the customization of care for any child. Rather, in a blanket fashion, DSS reduced its rates for room, board, and support services for all THERAPEUTIC FOSTER CARE providers.

required to pay FPCS the room, board and support services rates established as of August 1, 2009, which were \$42.50 per child, per day, for THERAPEUTIC FOSTER CARE Level I, \$57.75 for THERAPEUTIC FOSTER CARE Level II, and \$78.35 for THERAPEUTIC FOSTER CARE Level III.⁴ DSS is directed to pay FPCS the difference between the rates it paid FPCS from January 16, 2010 to present and the rates it should have paid FPCS.⁵



R. Voight Shealy
Chief Procurement Officer
for Supplies and Services

June 18, 2010
Date

Columbia, S.C.

⁴ The CPO notes that DSS does not control the portion of the fee paid FPCS by DHHS. Further, to any degree that FPCS attempts to argue that its fee for treatment is partially paid by SC Medicaid/DHHS, it does not change the ruling.

⁵ Any determination of actual damages requires a day-by-day analysis of children assigned by DSS to FPCS for therapeutic foster care, levels 1, 2, and 3. While much of this evidence was submitted previously, the record is incomplete. Although this should be merely a mathematical calculation, if the parties are unable to agree on the amount, they should submit a supplemental request along with all the supporting documentation, and the CPO will issue a supplemental order.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4230, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of the posting of the decision in accordance with Section 11-35-4230(5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel, or to the Procurement Review Panel, and must be in writing setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and any affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or legal.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2008 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2008 S.C. Act No. 310, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).

John D. Elliott

ATTORNEY AT LAW

THE NBSC BUILDING
1122 LADY STREET, FIFTH FLOOR
Post Office Box 607
Columbia, South Carolina 29202

phone (803) 252-9236
fax (803) 799-2079
email jayel@mindspring.com

January 29th, 2010

VIA ELECTRONIC and U.S. MAIL

S.C. Materials Management Office
ATTN Chris Manos
P.O. Box 101103
Columbia SC 29211

***RE: Protest – Family Preservation Community Services
Solicitation No. 06-S7191 5400000526***

Dear Mr. Manos:

I represent Family Preservation Community Services, 3710 Landmark Drive, Suite 109, Columbia SC 29204. This agency has a contract with the state of South Carolina, through the Department of Social Services, to provide therapeutic placement services to certain of the department's clients.

We are in receipt of the above solicitation, which amounts to a modification of the contract my client has with the department, and lodge the following formal protest pursuant to law, sometimes known as a "contract controversy."

Protest: My client protests the action of the department, reflected above. The above-referenced amendment reduces the daily payment rated for services provided by my client to the department by nine (9%) per cent of the original contract.

Grounds: The grounds for this protest are that the rate reduction imposed is a unilateral modification of the contract, and a breach of the contract. Furthermore, the rate reduction is arbitrary and capricious, and in violation of applicable state and federal law.

Relief sought: My client seeks enforcement of the present terms of the contract, without any rate reduction imposed by this solicitation or amendment for the contract period. Moreover, we seek a stay of the reduction in rate until this matter may be finally resolved pursuant to the terms of the South Carolina Procurement Code, and other applicable law.

John D. Elliott

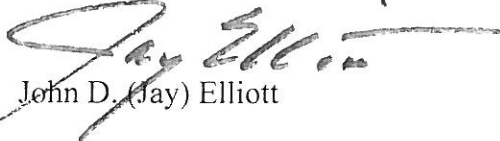
Chris Manos

RE: Contract Controversy – Family Preservation Community Services

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Please forward this protest to the proper recipient so that we can pursue our administrative remedies under law, and by all means let me know right away what additional information or authority you need to perfect our appeal.

Sincerely,

A handwritten signature in dark ink, appearing to read "Jay Elliott", with a long horizontal flourish extending to the right.

John D. (Jay) Elliott

JDE/

CC: STEPHANIE HALL